

October 18, 2019

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW
Room 10276
Washington, DC 20410-0500

**Re: *HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard;
Docket No. FR-6111-P-02***

To Whom It May Concern:

The American Financial Services Association (“AFSA”)¹ appreciates the opportunity to comment on the Department of Housing and Urban Development’s (“HUD” or the “Department”) proposed rule amending its interpretation of the Fair Housing Act’s² disparate impact standard to align with the Supreme Court’s ruling in *Inclusive Communities* (“Proposed Rule”).³ AFSA applauds the Department’s efforts to align the Proposed Rule with controlling Supreme Court precedent and believes the Proposed Rule should be finalized as drafted.

HUD has solicited comments from the public on seven specific questions related to the Proposed Rule, as well as other portions of the Proposed Rule. The questions presented in the Proposed Rule are reprinted in italics, followed by AFSA’s responses.

1. *How well do HUD’s proposed changes to its disparate impact standard align with the decision and analysis in Inclusive Communities with respect to the proposed prima facie burden, including:*
 - i. *Each of the five elements in the new burden-shifting framework outlined in paragraph (b) of § 100.500.*
 - ii. *The three methods described in paragraph (c) of § 100.500 through which defendants may establish that plaintiffs have failed to allege a prima facie case.*

Five Prima Facie Elements

HUD’s stated purpose in proposing changes to the 2013 disparate impact rule (“2013 Rule”) is to align it with the Supreme Court’s *Inclusive Communities* decision, which was decided two years after the 2013 Rule was finalized. Notably, the Supreme Court in *Inclusive Communities* made

¹ Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

² 42 U.S.C. 3601 *et seq.*

³ 84 Fed. Reg. 42,854 (Aug. 19, 2019).

clear that disparate-impact claims should be analyzed “with care”⁴ at the pleading stage to ensure that “the specter of disparate-impact litigation”⁵ does not prevent parties “from achieving legitimate objectives.”⁶ Throughout its decision, the Supreme Court cautioned against overreaching disparate impact claims and detailed heightened pleading standards for these types of claims to deter “abusive” disparate impact litigation. The Supreme Court advised, “Courts must therefore examine with care whether a plaintiff has made out a prima facie case of disparate impact and prompt resolution of these cases is important.”⁷ The Supreme Court also underscored that there must be “adequate safeguards at the prima facie stage” to ensure that the threat of disparate-impact liability does not lead to the use of “numerical quotas” which would result in “serious constitutional questions.”⁸

HUD carefully considered the pleading standards and cautionary language articulated in *Inclusive Communities* and issued the Proposed Rule to align with the applicable Supreme Court precedent. The five prima facie elements outlined in the Proposed Rule are consistent with the Supreme Court’s controlling case law and are necessary to ensure “adequate safeguards” at the pleading stage to prevent “abusive disparate-impact claims.”⁹

We discuss each of the five prima facie elements outlined in HUD’s Proposed Rule in turn below.

(1) That the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law;

In *Inclusive Communities*, the Supreme Court made clear that disparate-impact liability should be properly limited to situations in which the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest. The Supreme Court clearly articulated that the Fair Housing Act “imposes a command with respect to disparate-impact liability. . . . Governmental or private policies are not contrary to the disparate-impact requirement *unless* they are ‘artificial, arbitrary, and unnecessary barriers.’”¹⁰ The Court also indicated that a showing of “artificial, arbitrary, and unnecessary” must be “made out” by the plaintiff in the early stages of litigation in order to prevent “abusive disparate-impact claims.”¹¹

⁴ *Texas Department of Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2512 (2015).

⁵ *Id.* at 2524.

⁶ *Id.*

⁷ *Id.* at 2523 (citing *Griggs v. Duke Power Co.*, 401 U. S. 424, 431 (1971)).

⁸ *Inclusive Communities*, 135 S. Ct. 2507, 2522.

⁹ *Id.* at 2512.

¹⁰ *Id.* at 2524 (emphasis added). Later in the decision, the Court reiterated, “[p]olicies, whether governmental or private, are not contrary to the disparate-impact requirement *unless* they are ‘artificial, arbitrary, and unnecessary barriers.’” *Id.* at 2512 (emphasis added)(internal citations omitted).

¹¹ *Id.* The Court stated, “Courts must therefore examine with care whether a plaintiff has made out a prima facie showing of disparate impact, and prompt resolution of these cases is important. Policies, whether governmental or private, are not contrary to the disparate-impact requirement unless they are ‘artificial, arbitrary, and unnecessary barriers.’ Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision. These limitations are also necessary to protect defendants against abusive disparate-impact claims.” *Id.* at 2512.

Another critical component of this element of the Proposed Rule is the recognition that a valid objective can be based on practical business considerations and/or profitability. Although the 2013 Rule declined to acknowledge that profitability can be a valid interest under a disparate impact analysis, the Supreme Court’s decision in *Inclusive Communities* superseded the 2013 Rule and explicitly recognized practical business considerations—including profitability—and policy considerations as valid business interests. Disparate-impact liability, according to the Supreme Court, “must be limited” to ensure that “regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system.”¹² In light of the Supreme Court’s mandate, amendments to the 2013 Rule are required to recognize that practical business considerations are valid interests under a disparate-impact analysis. The Supreme Court also made clear that disparate-impact liability mandates the removal of artificial, arbitrary and unnecessary barriers, “but not a displacement of valid governmental and private priorities.”¹³ In the same vein, the Supreme Court explicitly cautioned against “second-guess[ing] which of two reasonable approaches” an entity might follow in the sound exercise of its discretion.¹⁴

Based on the above, AFSA supports this element of the Proposed Rule to align with the Supreme Court’s decision in *Inclusive Communities*.

(2) That there is a robust causal link between the challenged policy or practice and a disparate impact on members of a protected class that shows the specific practice is the direct cause of the discriminatory effect;

The robust causality requirement is at the heart of the Supreme Court’s decision in *Inclusive Communities*. The Court stated plainly in its decision: “A plaintiff who fails to allege facts *at the pleading stage* or produce statistical evidence demonstrating *a causal connection cannot make out a prima facie case of disparate impact.*”¹⁵ The Court also explicitly stated that “a disparate-impact claim that relies on a statistical disparity *must fail* if the plaintiff cannot point to a defendant’s policy or policies *causing* that disparity.”¹⁶ A showing of robust causality, according to the Supreme Court, is required to ensure that “[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact” thus “protect[ing] defendants from being held liable for racial disparities they did not create.”¹⁷ In *Inclusive Communities*, the Court also noted that the robust causality requirement is deeply rooted in Supreme Court precedent. The Court pointed out that disparate-impact liability “has always been properly limited in key respects to avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity.”¹⁸

AFSA supports this element of HUD’s Proposed Rule because it is mandated by the Court’s clear directive—statistical disparities alone are wholly insufficient to bring a claim of discrimination under the disparate-impact theory of liability.

¹² *Id.* at 2518 (emphasis added).

¹³ *Id.* at 2522 (internal quotations omitted)(citing Griggs at 431).

¹⁴ *Id.*

¹⁵ *Id.* at 2523 (emphasis added).

¹⁶ *Id.* (emphasis added).

¹⁷ *Id.* at 2523 (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989)).

¹⁸ *Id.* at 2522.

(3) That the alleged disparity caused by the policy or practice has an adverse effect on members of a protected class;

The third element of a prima facie claim of disparate impact under HUD's Proposed Rule is uncontroversial. It is undisputed that, in order to bring a disparate-impact claim, a plaintiff must show that the challenged policy or practice has a "disproportionately adverse effect"¹⁹ on members of a protected class.

(4) That the alleged disparity caused by the policy or practice is significant; and

In order for disparate-impact liability to be "properly limited" to avoid "abusive" claims as mandated by the Court's decision in *Inclusive Communities*, a plaintiff must be required to show that the disparity caused by the defendant's policy or practice is significant. Consistent with precedent, HUD's Proposed Rule includes a materiality threshold. Without this important "safeguard," businesses would be forced to "manage the numbers" and consider race in a "pervasive way" that could lead to the use of "numerical quotas" and the "serious constitutional questions" that the Supreme Court warned against in *Inclusive Communities*.

The absence of a materiality threshold would likely incentivize frivolous disparate-impact claims. Further, it would lead to the specific concerns articulated by the Court by requiring companies seeking to avoid liability to "[inject] race into every housing decision" and "second-guess" between two reasonable approaches in an effort to achieve perfect parity.

In practice, some element of materiality has typically been applied to disparate impact claims. Nevertheless, to avoid ambiguity, AFSA supports codifying materiality as a required element of a disparate impact claim. This will provide greater clarity and consistency to industry and allow businesses leeway to make "practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system."²⁰

(5) That there is a direct link between the disparate impact and the complaining party's alleged injury

This element of HUD's Proposed Rule codifies the proximate cause requirement, which is required to show a violation of the Fair Housing Act. In *Bank of America Corp. City of Miami*,²¹ the Supreme Court stated that a claim for damages under the Fair Housing Act is akin to a tort action and is thus subject to the common-law requirement that the alleged loss is attributable to the proximate cause and "not to any remote cause."²² The Court held in *City of Miami* that "foreseeability alone is not sufficient to establish proximate cause" under the Fair Housing Act.²³ The Court noted that, because "[t]he housing market is interconnected with economic and social life," a violation of the Fair Housing Act is expected "to cause ripples of harm far beyond the

¹⁹ *Id.* at 2513 (citing *Ricci v. DeStefano*, 557 U. S. 557, 577 (2009)).

²⁰ *Id.* at 2519.

²¹ 137 S. Ct. 1296 (2017).

²² *Id.* at 1305.

²³ *Id.*

defendant’s misconduct.”²⁴ As a result, in order to establish proximate cause under the Fair Housing Act, a plaintiff “must do more than show that its injuries foreseeably flowed from the alleged statutory violation.”²⁵ Instead, proximate cause under the Fair Housing Act requires, according to the Supreme Court, “some *direct relation* between the injury asserted and the injurious conduct alleged.”²⁶ AFSA supports the adoption of this element of the Proposed Rule and the codification of the Supreme Court’s precedent mandating that “foreseeability alone is not sufficient to establish proximate cause,” as this is necessary for protecting companies from having to defend claims for alleged harms they did not cause.

Methods for Defending a Prima Facie Case

In addition to requesting feedback on the elements required to establish a prima facie case of disparate-impact liability, HUD also has requested feedback on the Proposed Rule’s methods for establishing that a plaintiff has failed to sufficiently allege a prima facie case of disparate impact. The Proposed Rule provides a defendant can establish that a plaintiff’s allegations do not support a prima facie case of disparate impact under the Fair Housing Act using three methods. AFSA believes the three methods for defending a prima facie claim outlined in the Proposed Rule are consistent with Supreme Court precedent and should be finalized as drafted.

The most straightforward method to defend against a prima facie case of disparate impact under the Proposed Rule is to demonstrate that the plaintiff has failed to allege sufficient facts to meet one or more of the required elements of a prima facie case.²⁷ Under the Proposed Rule, a defendant also can show that a plaintiff has failed to sufficiently allege a prima facie case by showing that the defendant’s discretion is materially limited by a third party—for example, because of federal, state, or local law.²⁸ In the same vein, to the extent that a plaintiff’s allegations are based on the defendant’s use of a model, a defendant can rebut the allegations by showing that the model is “produced, maintained, or distributed by a recognized third party that determines industry standards” and that the inputs and calculations within the model are not determined by the defendant.²⁹ This method of defending a prima facie case of disparate impact is consistent with *Inclusive Communities*’ requirement of a robust causal connection between the alleged disparity and “a defendant’s policy or policies causing that disparity.”³⁰ In *Inclusive Communities*, the Supreme Court emphasized that defendants should not be held liable “for racial disparities they did not create”³¹ and remedial orders in disparate-impact cases should “concentrate on the elimination of the offending practice.”³² If a policy, practice, or model responsible for creating the alleged disparity is controlled or determined by a third party, it would be ineffective to target an individual defendant in order to “eliminat[e] the offending practice.” As a result, this method of

²⁴ *Id.* at 1306 (internal quotations omitted).

²⁵ *Id.* at 1301.

²⁶ *Id.* at 1306 (citing *Homes v. Securities Investors Protection Corporation*, 503 U.S. 258, 268 (1992))(emphasis added).

²⁷ Proposed 24 C.F.R. § 100.500(c)(3).

²⁸ Proposed 24 C.F.R. § 100.500(c)(1).

²⁹ Proposed 24 C.F.R. § 100.500(c)(2)(ii).

³⁰ *Inclusive Communities*, 135 S. Ct. 2507, 2523 (emphasis added).

³¹ *Id.* at 2523 (citing *Wards Cove*, 490 U. S. 642, 653 (1989)).

³² *Id.* at 2524.

defending against a disparate impact claim flows logically from the framework articulated by Supreme Court in *Inclusive Communities*.

For a proprietary model, the Proposed Rule provides two methods for a defendant to rebut a plaintiff's allegations that the proprietary model is the cause of the alleged disparity. A defendant may provide the material factors that make up the inputs in the model and show that they do not rely in any material part on factors that are substitutes or close proxies for prohibited bases and show that the model is predictive of credit risk or another similar objective.³³ In the alternative, a defendant can show that an "objective and unbiased neutral third party" has validated the challenged model and determined that the model is empirically derived and statistically sound and accurately predicts credit risk or other valid objectives. In addition, the third party must validate that the model does not use factors that rely in any material part on factors that are substitutes or close proxies for prohibited bases under the Fair Housing Act.³⁴ These methods of defending a prima facie case of disparate impact essentially provide a clear mechanism for a defendant to show that the model is not "arbitrary, artificial, and unnecessary" because it serves a "legitimate objective" and there is no "robust causality" between the model and the alleged disparity because the model does not use proxies for a prohibited basis. This is consistent with the Supreme Court's directive to ensure that disparate impact liability is "limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system."³⁵

By way of example, if a lender uses a proprietary algorithmic model for credit underwriting, the lender will be able to defend against a disparate impact claim by showing that the model (i) empirically derived and statistically sound; (ii) is predictive of credit risk and (iii) does not use any factors that are proxies for prohibited bases. If a lender can show that its model is predictive of credit risk, then the model is not "arbitrary, artificial, and unnecessary" to achieve a valid business objective (*i.e.*, evaluating creditworthiness). Moreover, if the lender can show that the model does not use any factors that are proxies for prohibited bases, then no "robust causality" can exist between the model and the alleged disparity because disparate impact liability cannot be based "solely on a showing of a statistical disparity."³⁶

The Supreme Court made clear in *Inclusive Communities* that defendants should not be held liable "for racial disparities they did not create." As Justice Thomas noted in his dissent, it is improper to "assume that a given racial disparity at an institution is a product of that institution rather than a reflection of disparities that exist outside of it."³⁷ There are myriad attributes of creditworthiness, such as credit scores and debt-to-income and loan-to-value ratios, that may disproportionately disadvantage minority applicants, yet are widely-accepted as necessary to ensure prudent underwriting because they are predictive of credit risk. The same rationale applies to algorithmic models. The industry should be able to use such models and defend them from disparate impact challenges if they do not contain factors that are mere proxies for prohibited bases.

³³ Proposed 24 C.F.R. § 100.500(c)(2)(i).

³⁴ Proposed 24 C.F.R. § 100.500(c)(2)(iii).

³⁵ *Inclusive Communities*, 135 S. Ct. 2507, 2518.

³⁶ *Id.* at 2522.

³⁷ *Id.* at 2520 (J. Thomas, dissenting).

AFSA supports the adoption of section 100.500(c) of the Proposed Rule as drafted to provide additional clarity to the industry around the use of algorithmic models and to provide appropriate guidance for managing ongoing compliance risks and defending against potential disparate impact claims.

2. *What impact, using specific court cases as reference, did Inclusive Communities have on the number, type, and likelihood of success of disparate impact claims brought since the 2015 decision? How might this proposed rule further impact the number, type, and likelihood of success of disparate impact claims brought in the future?*

In *Inclusive Communities*, the Supreme Court placed special emphasis on ensuring “safeguards” at the prima facie stage and deliberately articulated heightened pleading standards to ensure that the “specter of disparate-impact litigation” does not undermine legitimate business objectives. Moreover, the Supreme Court directed courts to “examine with care” a plaintiff’s prima facie case to avoid “abusive disparate-impact claims” and ensure “prompt resolution” when claims are unwarranted.

Since the Supreme Court’s decision in *Inclusive Communities*, subsequent lower court decisions have applied the framework articulated in the decision inconsistently. For example, several courts have failed to apply—or misapplied—the “robust causality” and “arbitrary, artificial, and unnecessary requirements” from *Inclusive Communities*.³⁸ Plaintiffs also have misinterpreted the *Inclusive Communities* framework and failed to adhere to the heightened pleading standards articulated by the Court. For example, as HUD notes in the preamble to the Proposed Rule, even after *Inclusive Communities*, some plaintiffs have failed to allege a specific, identifiable practice that caused the alleged disparate impact.³⁹ As a result of these inconsistencies, HUD’s Proposed Rule is necessary to bring greater clarity and consistency to actions alleging a disparate impact in violation of the Fair Housing Act.

Plaintiffs’ ultimate likelihood of success should not be affected by the Proposed Rule, because it conforms to applicable Supreme Court precedent and plaintiffs with valid disparate impact claims still will be able to prevail on the merits. The Proposed Rule also will provide plaintiffs greater clarity and transparency regarding the required prima facie elements. With respect to defendants, the Proposed Rule should significantly reduce the number of frivolous claims that a defendant will be required to defend and increase defendants’ ability to efficiently dismiss claims that lack merit in the pleading stages, avoiding the significant costs involved with protracted litigation.

³⁸ See *County of Cook v. Bank of America Corp.*, 2018 WL 1561725 at *8-9 (N.D. Ill. 2018)(failing to apply the robust causality requirement holding that plaintiffs’ claims could survive a motion to dismiss because “at the pleading stage of a lawsuit, [i]t is enough to plead a plausible claim, after which a plaintiff receives the benefit of imagination, so long as the hypotheses are consistent with the complaint”); *Montgomery County, Maryland v. Bank of America Corp.*, 2019 WL 4805678 at *7-10 (D. Md. 2019)(failing to analyze whether there was a robust causal link between defendants’ pricing, underwriting, loan originator compensation, payment acceptance, loan modification, and foreclosure practices and the alleged harm to the plaintiffs); *National Fair Housing Alliance v. Bank of America, N.A.*, 2019 WL 3241126 at *9-12 (D. Md. 2019)(misapplying the robust causality standard and instead allowing for a “fair inference” of causality at the pleading stage).

³⁹ See, e.g., *Frederick v. Wells Fargo Home Mortg.*, 649 F. App’x 29, 30 (2d Cir. 2016)(plaintiff challenging mortgage loan denial).

3. *How, specifically, did Inclusive Communities, and the cases brought since Inclusive Communities, expand upon, conflict, or align with HUD's 2013 final disparate impact rule and with this proposed rule?*

Despite the material differences between the HUD 2013 Rule and the Supreme Court's decision in *Inclusive Communities*, some courts have erroneously suggested that the two standards are the same or substantially similar.⁴⁰ As a result, a significant issue arising from the inconsistencies between the 2013 Rule and the Supreme Court's decision in *Inclusive Communities* is the lower courts' misguided efforts to conform the two standards. These cases miss critical components of *Inclusive Communities* that distinguish the Supreme Court's decision from HUD's 2013 Rule. Notably, the 2013 Rule does not require plaintiffs to prove robust causality between the challenged policy or practice and the alleged disparity.⁴¹ The 2013 Rule also does not require that a challenged policy or practice must be "arbitrary, artificial, and unnecessary" to achieving a valid objective, which can include practical business and profitability. These exemplars of inconsistencies between HUD's 2013 Rule and *Inclusive Communities* underscore the importance of aligning HUD's regulations with the controlling precedent to avoid continued conflation of the two incongruous standards.

In *Inclusive Communities*, the Supreme Court provided a framework for considering disparate-impact claims under the Fair Housing Act. HUD is required to make changes to align its outdated regulations with superseding case law and eliminate confusion and inconsistent application of the law by lower courts, the Department, and other regulators. The Proposed Rule will provide both plaintiffs and defendants with greater clarity when evaluating whether potential disparate-impact liability is present in any given situation. For plaintiffs, it will provide greater transparency around the prima facie elements that must be met at the pleading stage and the likelihood of succeeding in litigation. Conversely, for defendants, it will provide an enhanced ability to assess whether a proposed policy or practice involves disparate impact risk. It also will help defendants to risk-weight litigation assessments, weighing the costs of settlement against the costs of the various stages of litigation. Most importantly, the Proposed Rule's alignment with Supreme Court precedent will increase consistency in outcomes in disparate-impact proceedings for all parties by detailing the framework to be applied universally by HUD, other regulators, and the courts.

⁴⁰ See, e.g., *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016) ("The Supreme Court implicitly adopted HUD's approach"); *Crossroads Residents Organized for Stable & Secure Residences v. MSP Crossroads Apartments LLC*, 2016 WL 3661146, at *6 (D. Minn. July 5, 2016) (explaining that *Inclusive Communities* "announced several 'safeguards' to incorporate into [HUD's] burden-shifting framework," including a "robust causality requirement" at the prima facie stage and "leeway" when the burden shifts to the defendant to explain the interests served by the policies); *National Fair Housing Alliance v. Bank of America, N.A.*, 2019 WL 3241126 at *16 (D. Md. 2019)(the Court's decision in *Inclusive Communities* "hew[ed] closely to regulations promulgated by HUD in 2013").

⁴¹ *Inclusive Communities*, 135 S. Ct. 2507, 2522.

4. *How might the proposed rule increase or decrease costs and economic burden to relevant parties (e.g., litigants, including private citizens, local governments, banks, lenders, insurance companies, or others in the housing industry) relative to the 2013 final disparate impact rule? How might the proposed rule increase or decrease costs and economic burden to relevant parties relative to Inclusive Communities?*

As described above, the Proposed Rule’s alignment with binding Supreme Court precedent will bring greater clarity and consistency to Fair Housing Act compliance, enforcement, and litigation. AFSA’s members welcome greater clarity in the applicable legal framework that will enable them to manage to a consistent standard in assessing potential disparate impact risk, rather than being forced to manage to conflicting standards—the 2013 HUD Rule and Supreme Court precedent. The Proposed Rule will decrease the costs and burdens of compliance for the industry by reiterating that statistics alone are insufficient to prove a violation of the Fair Housing Act. Alignment of the 2013 Rule with Supreme Court precedent also will significantly decrease costs associated with defending disparate-impact claims that are without merit because such claims now will be dismissed in the early stages of litigation. The ability to obtain dismissal of frivolous claims at the pleading stages will reduce unnecessary litigation expenses and deter plaintiffs from bringing “abusive” claims. The deterrent effect is especially important for AFSA’s members because, in the consumer financial services industry, a mere allegation of discrimination can cause serious reputational and business harm, even if the allegations subsequently are shown to be without merit. The goal of reducing frivolous and costly disparate-impact litigation is consistent with the Supreme Court’s intent in *Inclusive Communities*. As the Court explained, “[d]isparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system.”⁴²

5. *How might a decision not to amend HUD’s 2013 final disparate impact rule affect the status quo since Inclusive Communities?*

As discussed above, HUD’s 2013 Rule is inconsistent with Supreme Court precedent. A failure to amend the 2013 Rule fosters continued inconsistency in the disparate impact standards applied by HUD, other regulators, and the courts in Fair Housing Act proceedings. For clarity and consistency in industry, a single, consistent standard is necessary. Requiring industry participants to manage to two inconsistent standards also unnecessarily increases compliance costs by creating regulatory uncertainty.

The 2013 Rule, as it stands, conflicts with binding Supreme Court precedent and places inappropriate burdens on entities defending disparate impact claims. Defendants are forced expend finite resources defending meritless allegations or pay significant sums of money to settle because the costs of protracted litigation are even more onerous. This litigious environment allows plaintiffs to unfairly leverage costly settlements from industry participants through the mere threat of litigation. The use of disparate impact litigation as a weapon, rather than a tool to prevent “perpetuating segregation” or “arbitrarily creating discriminatory effects,”⁴³ starkly contradicts the Supreme Court’s clear directive in *Inclusive Communities*; appropriate “safeguards” are required

⁴² *Id.* at 2519.

⁴³ *Inclusive Communities*, 135 S. Ct. 2507, 2522.

to protect defendants from “abusive disparate-impact claims.”⁴⁴ For the reasons described herein, HUD must revise the outdated 2013 Rule to align with the controlling Supreme Court precedent, as contemplated by the Proposed Rule.

6. *What impact, if any, does the addition of paragraph (e) of § 100.500 regarding the business of insurance have on the number and type of disparate impact claims? What impact, if any, does the proposed paragraph (e) have on costs (or savings) and economic burden of disparate impact claims?*

AFSA does not have specific comments in response to this question.

7. *Is there any other data, information, or analysis the public can provide to assist HUD in assessing the impact of the proposed regulation relative to the 2013 disparate impact final rule and the 2015 Supreme Court decision in Inclusive Communities?*

AFSA does not have specific comments in response to this question. AFSA supports the implementation of the Proposed Rule as drafted because it properly conforms the outdated HUD 2013 Rule with controlling Supreme Court precedent.

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Availability of Punitive Damages

In addition to the specific questions outlined above, HUD is seeking feedback on several other discrete portions of the Proposed Rule. HUD is specifically seeking feedback on the question of whether, and under what circumstances, punitive damages may be appropriate in disparate impact litigation. AFSA fully supports HUD’s statement in the Proposed Rule that punitive damages are not authorized under the disparate impact theory of liability.⁴⁵ This is necessary to align the 2013 Rule with binding Supreme Court precedent and to provide clarity to interested stakeholders.

It is undisputed that the remedy for a remediable disparate impact is declaratory or injunctive relief, or that the remedy for a remediable disparate treatment is both declaratory or injunctive relief as well as actual and punitive damages, and civil money penalties. AFSA agrees that the Fair Housing Act provides for damages and penalties, but believes that punitive damages are inappropriate in disparate impact cases. Disparate impact does not involve intentional discrimination; it involves conduct that was never intended to be discriminatory, but had the inadvertent effect of disfavoring one or more groups on a prohibited basis. It certainly may be appropriate to require a defendant to change a neutral policy when an alternative policy would serve the underlying need equally as effectively, without increasing costs and other burdens to the defendant. However, it is quite another thing to punish a person for using a neutral policy or practice that yielded an unintended outcome.

Imposing punitive damages or penalties in disparate impact cases is overly harsh and arguably runs afoul of defendants’ due process rights. Such remedies should be reserved for situations

⁴⁴ *Id.* at 2512.

⁴⁵ Proposed 24 C.F.R. § 100.7(c).

involving intentional conduct. This approach is consistent with the Court's view in *Inclusive Communities*.⁴⁶ As such, AFSA supports the adoption of this section of the Proposed Rule as drafted.

* * * *

AFSA appreciates the opportunity to provide comments on HUD's Proposed Rule. We hope you find our recommendations useful. Please contact me by phone, 202-776-7300, or email, cwinslow@afsamail.org, with any questions.

Sincerely,



Celia Winslow
Vice President, Legal & Regulatory Affairs
American Financial Services Association

⁴⁶ See *Inclusive Communities*, 135 S. Ct. 2507, 2523. "It must be noted further that, even when courts do find liability under a disparate impact theory, their remedial orders must be consistent with the Constitution. Remedial orders in disparate impact cases should concentrate on the elimination of the offending practice that "arbitrar[ily] . . . operate[s] invidiously to discriminate on the basis of rac[e]." This is also consistent with the approach Congress envisioned when it amended Title VII in 1991. The legislative history of those amendments indicate that the Title VII revisions "do not give victims an unlimited entitlement to damages. Compensatory damages are available only in cases of intentional discrimination."